No. 78-1922

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1978

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.,

Petitioners,

v.

ALFRED E. KAHN, CHAIRMAN OF THE COUNCIL ON WAGE AND PRICE STABILITY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. ALBERT WOLL
815 Fifteenth Street, N. W.
Washington, D.C. 20005

LAURENCE GOLD
815 Sixteenth Street, N. W.
Washington, D.C. 20006

Counsel for the AFL-CIO, et al.

[Counsel for the Individual Petitioners are listed on the Signature Page]

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Petitioners American Federation of Labor and Congress of Industrial Organizations, et al., pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment entered June 22, 1979 in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is submitted herewith as Appendix A to this petition. The judgment of the Court of Appeals is submitted herewith as Appendix B to the petition. The opinion of the United States District Court for the District of Columbia is not yet officially reported. It is submitted herewith as Appendix C to this petition. The judgment of the District Court is submitted herewith as Appendix D. 1/

1/ Throughout this petition the District Court's opinion will be referred to as "D.C. Op." The majority opinion in the Court of Appeals will be referred to as "C.A. Op.", the dissenting opinions will be referred to as MacKinnon Op. and Robb Op., respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1979. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is E.O. 12092 authorized by Congress insofar as the Executive Order "requires compliance with the pay and price standards established pursuant to the Order as a condition of eligibility for Government contracts?

STATUTES AND EXECUTIVE ORDER INVOLVED

This case involves the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §481 et seq., the Armed Services Procurement Act of 1947, 10 U.S.C. §2305 et seq., the Council on Wage and Price Stability Act of 1974, 12 U.S.C. §1904 note, and the National Labor Relations Act, 29 U.S.C. §141 et seq. and the Moore Amendment to the Second War Powers Act, 50 U.S.C. §645b. They are reproduced in pertinent part as Appendix E to this petition. The case also involves Executive Order 12092, 43 Fed. Reg. 51375. It is reproduced as Appendix F to this Petition.

STATEMENT OF THE CASE

1. On November 1, 1978 President Carter issued Executive Order 12092 (43 F.R. 51375 (Nov. 3, 1978)) which provides in pertinent part:

> 1-102. Noninflationary wage and price behavior shall be measured by the following standards: * * *
> (b) For pay, noninflationary pay behavior is the holding of pay increases to not more than 7 percent annually above their recent historical levels.
> (c) These standards, which shall be further defined by the Chairman of the Council on Wage and Price Stability, shall be subject to certain limitations and exemptions as determined by the Chairman.
> 1-103. In order to ensure economy and efficiency in government procurement, the head of each Executive agency and Military Department shall ensure that their contracts incorporate, on and after January 1, 1979, a clause which requires compliance by the contractor, and by his subcontractors and suppliers, with the standards set forth in Section 1-102 of this Order. * * *
> 1-104. Each Executive agency and each Military Department shall comply with the directions of the administrator for Federal Procurement Policy, who in accord with Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405), shall be responsible for the overall direction of the implementation of Section 1-103 including the issuance of regulations and procedures for determining exceptions and granting exemptions.

Subsequently the Chairman of the Council on Wage and Price Stability issued regulations to implement §§1-101 and 1-102 of the Executive Order and the Administrator of the Office of Federal Procurement Policy issued regulations to implement §§1-103 and 1-104.

The COWPS regulations make it plain inter alia that the pay standard covers both wages and fringe benefits (such as health insurance and pension benefits), and that with regard to employees covered by a collective agreement compliance is to be judged on a contract by contract and not on a company-wide basis.

The OFPP regulations, in turn, specify that with regard to solicitations for bids for Federal procurement contracts made on or after

February 15, 1979, the Government will not enter into contracts in excess of five million dollars with contractors who (a) do not themselves certify compliance with the pay standard and (b) do not insure that "first tier" subcontractors awarded subcontracts over five million dollars will also certify compliance with that standard. For this purpose compliance requires not only that employees producing the goods the Government seeks to purchase be covered by a collective agreement within the pay standard but that all employees of the bidding company be covered by such agreements. The OFPP regulations further provide that a contractor who has certified compliance with the wage guidelines and is later determined to have been willfully out of compliance "will be ineligible for any further Federal contracts and subcontracts in excess of five million dollars unless such ineligibility is waived."

2. The AFL-CIO and the 104 national and international unions that are members of the Federation are labor organizations that pursuant to the National Labor Relations Act and the Railway Labor Act directly and through affiliated organizations represent millions of working men and women and on their behalf regularly engage in collective bargaining with respect to wages, hours, terms and conditions of employment. The companies with whom these unions deal include those who regularly seek and secure federal procurement contracts and first tier subcontracts in excess of five million dollars ("federal contracting companies").

Prior to the issuance of E.O. 12092 and the implementing COWPS and OFPP regulations, the negotiations between these labor organizations and federal contracting companies proceeded under the system of free collective bargaining stated in the NLRA and RLA. Under that system it is the employer and his employees who determine the financial terms on

which the employees will provide their labor (subject to certain minimum standards provided by law) and the only sanctions available against the parties who conclude an agreement deemed "excessive" are those imposed by the market on companies that are not competitive and by adverse public opinion. The point of E.O. 12092 is to diminish the freedom just described. The Executive Order "requires" compliance with the pay standard by providing that if these parties conclude a collective agreement outside that standard the Government will respond by barring the employer from Government contracts, even though the employer is the low bidder on the contract and even though the agreement in question covers company employees engaged in whole or in significant part in providing goods for the private sector. Thus, E.O. 12092 adds a new sanction -- debarment from Government contracts -- to those provided by Congress. And this sanction has proved powerful and effective. Based on the threat of debarment, federal contracting employers have refused to make pay offers outside the standard, to respond to such union offers, or to sign or put noncomplying agreements into effect.

3. This suit was brought on March 13, 1979, immediately following the issuance of the regulations implementing E.O. 12092, by the plaintiff labor organizations to redress the injuries they and the members they represent were suffering by reason of the Executive Order and those regulations. The subsequent course of proceedings was described by the District Court:

> On May 2, 1979, the United Rubber Workers [one of the plaintiff uions] applied for temporary injunctive relief, seeking to enjoin the defendants from interfering with the then ongoing collective bargaining with several rubber companies and otherwise exercising authority under the Executive Order and the regulations. The application for a temporary restraining order was denied on May 4. At that time it appeared that cross

> motions for summary judgment were an appropriate and expedient means of presenting and resolving the issues involved. All counsel concurred, filed briefs on an expedited schedule and presented oral argument on May 16, 1979. [D.C. Op. 2-3.]

The District Court ruled that:

> President Carter has exceeded the authority conferred on him by the Constitution by seeking to control incomes and thereby prices through the procurement power. The program establishes a mandatory system of wage and price controls, unsupported by law. The Court, therefore, reluctantly concludes that the President's anti-inflation program cannot be sustained. [Id. at 24.]

That Court therefore entered an order dated June 1, 1979 providing, inter alia:

> Defendants are hereby enjoined from administering, enforcing or giving any force and effect to the program with respect to wages embodied in the pay standard of Executive Order 12092 to the extent that said standard is implemented by OFPP regulations issued pursuant to §§1-103 & 1-104 of said Executive Order. [App. D.]

The Court of Appeals, acting on the suggestion of the parties, set an expedited schedule, stayed the District Court order, and sua sponte heard the case, en banc, on June 13. In an opinion dated June 22, Chief Judge Wright, for six members of the Court of Appeals, disagreed with the lower court and ruled that E.O. 12092 is authorized by the Federal Property and Administrative Services Act of 1949 and is not barred by the Council on Wage and Price Stability Act or the National Labor Relations Act. Judges Bazelon and Tamm wrote brief concurring opinions. Judge MacKinnon wrote a dissenting opinion and Judge Robb wrote a dissenting opinion in which Judge Wilkey joined.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS A SUBSTANTIAL QUESTION OF EXTRAORDINARY PUBLIC SIGNIFICANCE IN ITS IMMEDIATE IMPACT AND IN ITS LONG-TERM IMPLICATIONS CONCERNING PRESIDENTIAL POWER TO REGULATE THE ECONOMY

A. In a joint motion to expedite appeal in the court below, the parties stated:

> While the parties, of course, disagree as to whether the decision below is correct, they agree that the issue presented as to whether or not the President exceeded his constitutional authority in establishing a program to deal with inflation, which the district court properly characterized as a "vexing and festering domestic problem *** [whose] impact has been felt in every facet of our political economy," is of extraordinary public significance.

And that extraordinary public significance was recognized by both of the lower courts in proceeding to hear and adjudicate the matter with unusual dispatch, and by the Court of Appeals in choosing sua sponte to hear the the matter en banc. These assessments of the importance of this litigation were well founded.

As stated in affidavits filed by respondents below, the procurement compliance program of E.O. 12092 "is expected to reach sixty-five to seventy percent of all Government procurement dollars, or about $50 billion worth." (C.A. Op. 4, n. 9.) But this represents only a part of the program's impact. For, the Executive Order governs not only the prices charged by the contractor to the Government, and the wages of employees for their work on such contracts, but these contractors' prices to all customers and the wages of all their employees. Accordingly, the case involves the legality of the use of the government's enormous purchasing power to regulate the vast segment of the economy represented by the Government's major suppliers of goods and services and their many millions of employees.

If, as the District Court and the three dissenting Circuit Judges concluded, E.O. 12092 is unlawful because not authorized by Congress, these restraints should be removed. Specifically, the affected employees who are represented by the plaintiffs should be permitted to set the terms of their labor through free collective bargaining in accordance with the National Labor Policy, unfettered by artificial maxima imposed by the respondents pursuant to the challenged Executive Order. That restraint bears particularly harshly on wage earners because the costs of the basic necessities (food, shelter and energy) are permitted by the Government to increase at a rate far greater than the guidelines permit with respect to their wages.

Moreover, while all agree that inflation is a most serious national problem, there is sharp disagreement as to the most efficacious means of combatting it. That, of course, is not a question for judicial cognizance, and it is not raised in any way by this petition. It is, however, very much a matter for legislative policymaking, and the Council on Wage and Price Stability Act of 1974 ("COWPSA") demonstrates that the 93rd Congress which enacted COWPSA after refusing to extend the Economic Stabilization Act of 1970, believed that inflation could only be curtailed or halted by allowing the free market to operate and that it considered interference with that market to be fundamentally unsound and counterproductive. The sponsors of that legislation stated that:

> We should draw the line on acceptable amendments to this legislation where the discipline of an agency or a council of the Federal Government begins to replace the discipline of the marketplace. The discipline of the marketplace should be the final arbitrator of wages and prices. [120 Cong. Rec. 2883, (Sen. Tower) quoted with emphasis at D.C. Op. 21.]

The determination to restrict the President to the narrow authority stated in §3(a) of COWPSA is consistent with Congress' historic practice in the field of wage and price controls which the legislature has taken special pains to occupy:

> Delegation of mandatory control power as well as the standards and means by which controls may be instituted has been carefully limited. On the few and extraordinary occasions when controls have been found necessary, Congress has granted such authority expressly, by positive legislation limited both in scope and particularly in duration. [D.C. Op. 17.]

There is, to be sure, dispute between the parties as to the meaning and effect of §3(b) of the COWPSA which withheld authority from the Executive to impose "any mandatory economic controls". But respondents have presented nothing which even suggests that the policy of the 93rd Congress was otherwise than Senator Tower stated it to be or that its policy has subsequently been superseded by a legislative policy favoring any form of Government regulation of wages and prices. Nor did the Court of Appeals, which dismissed §3(b) of COWPSA as "irrelevant" (C. A. Op. 22) address its sponsors' explanations of the policy of that Act, the earlier decision to terminate the Stabilization Act,or Congress' practice of refusing to grant the Executive a continuing authority to control wages and prices. Whether this clear Congressional policy as to how to deal with inflation and when to sanction Government regulation may be overridden by a Presidential initiative is an issue calling for this Court's determination.

B. In addition to the extraordinary public significance of the immediate outcome of this litigation, the judgment below should be reviewed because of the long-term significance of the Court of Appeals' interpretation of the federal statute in which it found authority for E.O. 12092. That

interpretation attributes to Congress the intent to delegate to the President sweeping powers to regulate the general economy in the guise of formulating procurement policy. The majority below found that authority in the Federal Property and Administrative Services Act of 1949 ("FPASA"), specifically §205(a) thereof which provides that "The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act ***" (C. A. Op. 7.) As that court also observed,

> The congressional declaration of policy for the FPASA sets forth the goal of an "economical and efficient system for *** procurement and supply." [Quoting §2.] Section 201 directs that the Administrator of General Services chart policy and procure supplies in a manner "advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned." [Id. at 8-9; emphasis in original.]

We pass for the moment the correctness of the Court of Appeals' interpretation of FPASA, for at this point we wish to stress the import of that holding. According to that court, FPASA, which was described in the Committee Reports as a statute empowering the Executive to "properly administer" its "housekeeping activies,"[2/] authorizes any procurement regulations which will further "economy and efficiency" very broadly conceived. The result below, after all, went far beyond permitting the President to fix the maximum prices which contractors may charge to the Government (or increments in such prices), or even the wages which such contractors may pay their employees who produce goods for the Government. Indeed, the Court of Appeals recognized that E.O. 12032 might divert

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2/ H. Rep. No. 670, 81st Cong., 1st Sess., 3; S. Rep. No. 475, 81st Cong., 1st Sess., 2. Cf. Chrysler Corp. v. Brown, ___ U.S. ___, 47 L.W. 4434, 4442-4443 (April 18, 1979).

Government contracts "from low bidders who are not in compliance with the wage and price standards to higher bidders." (C. A. Op. 16.) In rejecting the District Court's reliance on that consequence of the challenged regulation, the court below not only deprecated the importance of competitive bidding for Government contracts,[3/] but accepted the respondent's theory that the Order's long-run impact on the general economy justified the regulation under FPASA:

> Moreover, to the extent that compliance with the wage and price standards is widespread, [throughout the economy] a corresponding reduction (or more gentle increase) in Government expenses should take place. * * * In addition, by setting standards for both wages and prices Executive Order 12092 attempts to eliminate the need for either business or labor to seek price and wage increases. Finally, if the voluntary restraint program is effective in slowing inflation in the economy as a whole, the Government will face lower costs in the future than it would have otherwise. Such a strategy of seeking the greatest advantage to the Government, both short- and long-term, is entirely consistent with the congressional policies behind the FPASA. [C. A. Op. 17-18, footnote omitted.]

On this view, any restrictions which the President chooses to impose on potential Government contractors would be authorized by FPASA as long as it can be even plausibly argued that its impact on the general economy would ultimately redound to the "economy and efficiency" of Government procurement.

3/ The Court of Appeals stressed that "Much Government procurement takes place through the processes of negotiation rather than formal advertisement and competitive bidding." (C. A. Op. 16-17.) The Government's affidavits and briefs did not rely on the difference between negotiated contracts and competitive bidding, and the impact of E. O. 12092 does not differ materially depending on the form of the purchase. For, a company which does not comply with the guidelines is ineligible to negotiate with the Government, even if it would be willing to agree to a contract which in every respect of price and quality is superior to any other contract the Government might obtain. And, of course, the Executive Order adds nothing to the Government's acknowledged right to negotiate for any price it chooses to insist on for the goods it wishes to buy.

Several examples should suffice as a demonstration. The President would, under the decision below, be empowered to provide that no Government contracts shall be let to any company which has participated in a horizontal merger with another company that produces the same goods or services for the Government, if either (or both) have a certain share of the market in that product or service. The President could do so, even if the merger would not violate the standards of the antitrust laws, because the elimination of any companies which are potentially competing bidders for Government contracts reduces the efficacy of the bidding requirements of the FPASA, and the preservation of the competitors potentially reduces the costs of the product to the Government. Indeed, we submit, such a regulation would have a more direct impact on the Government's costs than E. O. 12092. So too, companies could be required, in order to obtain Government contracts, to undertake to reinvest a stated portion of their income (or profit) on the contract -- or, following the example of E. O. 12092, of their total income or earnings -- for new plants and equipment. Such investment would, under generally accepted economic theory, improve the economy and efficiency of those producers, thereby enabling them to make better and/or cheaper products for the Government, as well as strengthening the economy as a whole, with an ultimate benefit to the Government as purchaser. Further, since the Court of Appeals proceeded as if the FPASA grants the President an economic policy role that may be exercised without reference to Congress' policies, the Executive having been rebuffed by the legislature on its proposal to authorize gasoline rationing, could simply condition Government contracts on compliance with a "voluntary rationing plan." No one denies that energy prices are the cutting edge of today's inflation. Certainly then, an orderly reduction in industrial

use could only reduce consumption, relieve the pressure on prices created by excess demand and produce "a corresponding reduction (or more gentle increase) in Government expenses" (C. A. Op. 18).

To be sure, the majority below sought "to emphasize the importance to our ruling today of the nexus between the wage and price standards and likely savings to the Government" (id.), and Judges Bazelon and Tamm reiterated that proposition in their concurring opinions. But these opinions fail entirely to delineate the limits of what is termed the President's "procurement power" under the statute (id.) given the attenuated "nexus" between FPASA and the Order which the majority discerned in this case -- the potential lowering of prices if inflation is checked in the economy at large. This belies the majority's protestation that it is not issuing "a blank check for the President to fill in at his will" (id.). The majestic sweep of the Presidential authority under FPASA, as conceived by the Court of Appeals, appears from the majority's discussion of "several executive actions taken explicitly or implicitly under §205" thereof. (Id. at 11.)[4/]

To give just one example, that court cited E. O. 11755 whereby President Nixon, citing §205(c) of the FPASA "continued in effect the exclusion from employment on federal contract work of certain state prisoners." (C. A. Op. 12.) While this appears to be a desirable social policy, and

4/ The majority says that its "approach *** might raise serious questions about the validity of an Order" which would suspend the "willful" violators of the National Labor Relations Act from seeking Government contracts, as proposed earlier in the 95th Congress. (C. A. Op. 18-19, n. 50.) To this disclaimer a dissenting opinion responded "But why? The majority ends on that note, so no more than a hint of a limitation emerges." (MacKinnon Op. 29.)

may well be authorized implicitly by some federal legislation,[5/] it is not easy to conceive how it promotes "economy or efficiency" in procurement except on some all-encompassing theory that any socially desirable regulation will have an ultimate beneficial effect on the Government as purchaser of goods and services. The Court of Appeals' reliance on this Executive Order as exemplifying the "procurement power" under the FPASA thus reveals that the power is wholly without ascertainable or intelligible limits.

As Judge Robb said, "Carried to its logical end the argument means that the executive's power to regulate industry and business is limited only by his judgment as to what will promote economy and efficiency in the government." (Robb Op. 5.) So too, Judge MacKinnon found

> troubling, *** the exceedingly attenuated character of the nexus between procurement policy and presidential action which the majority deems sufficient. This reading of section 205(a) admits to no boundaries on presidential action but instead permits the President to effect any social or economic goal he chooses, however related or unrelated to the true purposes of the 1949 Act, as long as he can conceive of some residual consequences of the order that might in the long run help the Nation's economy and thereby serve the "not narrow" and undefined concepts of "economy" and "efficiency" in federal government procurement. [MacKinnon Op. 25.]

5/ The Court of Appeals observed (C. A. Op. 12, n. 31) that this Order "derived from Executive Order 325A issued by President Theodore Roosevelt in 1905". That Order did not cite any procurement legislation but only an act of Congress of February 23, 1887 whereby "all officers or agents of the United States were as a matter of public policy forbidden, under appropriate penalties, to hire or contract out the labor of any criminals who might thereafter be confined in any prison, jail, or other place of incarceration for the violation of any laws of the Government of the United States of America."

C. The foregoing demonstrates that the decision below raises issues of great moment both in sanctioning the immediate exercise of Executive power involved and by declaring that FPASA grants a "procurement power" to regulate the general economy in a manner the President concludes will in the "long-term" result in benefits to the Government as a purchaser. Review is therefore warranted unless it is certain that the decision below is right. Any such certitude must be dispelled by reading the reasoned opinions of the District Court and of the dissenting Judges in the Court of Appeals. But to make assurance double sure, we isolate some of the majority's critical errors and omissions.

(1) The FPASA. We cannot improve on Judge MacKinnon's central insight:

> It is no accident that the majority opinion cannot point to any legislative history of the 1949 Act to justify its holding that the President can use his procurement power to control wage and prices of federal government contractors, for there is not a single passage in that history--not even an off-hand remark--remotely supporting the use of the procurement power to achieve nonprocurement objectives. * * * The legislative history of the 1949 Act is replete with indications of congressional concern about the absence of central management of the federal government's purchasing and property maintenance mechanisms, with all the attendant inefficiencies. [Citations omitted.] It is in the context of these problems, and these problems alone, that the 1949 Act must be read. * * *
>
> As the House sponsor of the 1949 Act explained, the "key" to the new property management scheme was the Administrator's power in section 201 to provide for a "uniform yet flexible system--Government-wide--for procurement, warehousing, property identification, supply, traffic management, and management of public utility services." 95 Cong. Rec. 7442 (1949) (remarks of Rep. Holifield). It was the uniformity of policies and procedures that was "absolutely essential to achieve economy, efficiency, and substantial savings." Id. Congress was not reordering the national economy in an effort to save money; it was cleaning out the Government's house, fashioning the government's procurement and property management system in accordance with sound business principles. S. Rep. No. 475, supra, at 1.

> Consistent with sound business principles, Congress wanted to ensure uniformity in procurement decisions and to clarify the chain of command. Therein lies the sole purpose of section 205(a). Congress intended to avoid any implications that the General Services Administration was an independent administrative agency free from direct presidential control. * * * It certainly did not envision the General Services Administration or any other federal government procurement office acting as a kind of partner to the Federal Reserve Board in managing the Nation's economic affairs, and a fortiori it did not intend the President to use his procurement oversight powers as an instrument to that effect. [MacKinnon Op. 6-9.]

An additional point is warranted. As we have noted, Government dictation of the wages paid and the price charged in the private economy has been regarded in this country as a desperate last resort. In the 1946 Amendments to the Second War Powers Act Congress took the steps necessary to dismantle the control machinery it had built during the war. To underline that purpose, what is now 18 U.S.C. §645b was enacted to establish a rule of construction against implied grants of control authority. One year later in troubled economic times not unlike the present, Congress after the most thorough consideration, rewrote the nation's labor laws. Senator Taft stated a guiding premise of that legislation:

> * * * [I]f we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.
>
> I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, "You must work at wages fixed by the Government"? I think it is a long step from freedom, and a long step from a free economy to give the Government such a right.

> It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process. * * * [93 Cong. Rec. 3835-3836 quoted as authoritative in Bus Employees v. Wisconsin Board, 340 U.S. 383, 395-396, n. 21.]

It is wholly implausible, we submit, that two years later Congress, without notice, discussion or debate intended in passing FPASA to grant the President the authority to use the Government's purchasing power to "require compliance" by Government contractors with the Executive's pay and price standards.

(2) Executive Practice. The Court of Appeals' majority found it "useful to consider how the procurement power has been exercised under [FPASA]" (C. A. Op. 10.) And so it is, but the phrasing of the point is much too narrow. FPASA is a simplification and rationalization of earlier laws governing procurement, not a first essay. The Congress that recodified and modified those earlier laws acted against the Executive practice prior to 1949. That practice can be said to have informed Congress' understanding in drafting FPASA. And the Court of Appeals does indeed advert to earlier Executive action. But it draws no lesson therefrom. Yet the fact that leaps to attention is that neither that court, nor respondent Kahn, has found a single pre-1949 instance in which the Executive took an initiative designed to achieve general social and economic ends by regulating Government contractors in reliance on a procurement statute or on a general "procurement power".

E.O. 325A (C. A. Op. 12, n. 31), as already noted, relied on the policy declared in a closely related 1887 Act of Congress stating the legislature's policy on prisoner-made goods. And, as the court below acknowledged "Since 1941 * * * the most prominent use of the President's authority under the FPASA has been a series of anti-discrimination requirements for government contractors. The early anti-discrimination orders were issued under the President's war powers and special wartime legislation". (C. A. Op. 13; emphasis added, footnote omitted.) We do not see how Executive Orders bottomed on extraordinary legislation to deal with the most pressing emergency a nation faces can serve as a predicate for the conclusion that FPASA grants to the President a continuing far-ranging "procurement power". And, in the court below, respondents Kahn, et al., cited only the ban on payment by Government contractors to contracting agents of contingent fees (Kahn Br. 33, n. 23) -- plainly a prophylactic measure designed solely to protect immediate procurement needs and applicable only to Government contracting not to the entire business of Government contractors.

When one turns to the post-1949 "executive actions" which, according to the majority below, were "taken explicitly or implicitly under §205 of the FPASA" that evidence cuts strongly against, rather than in favor of, the majority's construction of that provision.

None of the cited orders in the period 1949 to 1964 cites the FPASA as authority; and the 1951 anti-discrimination orders actually cite other statutes. (See C. A. Op. 13, n. 32.) Thus, the rule of construction relied on at C. A. Op. 11, n. 28, gravely undermines the majority's view; for as Justice Cardozo wrote in the leading case on this subject, that rule "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion;

of making the parts work efficiently and smoothly while they are yet untried and new." (Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (emphasis added).)

As just mentioned, the majority relied particularly heavily on the anti-discrimination orders which have been issued by various presidents beginning with President Franklin Roosevelt in 1941. The Court observed that "but for the period from 1953 to 1964 only the FPASA could have provided statutory support for the Executive action". (C.A. Op. 13.) From this the majority drew two conclusions -- that the President actually relied on the FPASA during that period and that Congress, by not overriding those orders, ratified that interpretation of the FPASA. This reasoning is clearly fallacious. First, it assumes that those Orders were validly authorized during that period. Second, it overlooks an alternative legal source of authority for those Orders, namely the Constitution, which precludes the Government from fostering racial discrimination, and with which the President must, of course, comply. It is only by excluding these possibilities that the lower court could conclude, as it did, that the FPASA was the source of the President's power to issue those Orders. And while that court relied on decisions in other courts of appeals which supported anti-discrimination orders in part on the authority of the FPASA, it ignored this Court's opinion in Chrysler Corp. v. Brown, supra, which expressly left open the question of

> "whether Executive Order 11246 as amended is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Enforcement Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority". [47 LW 4440-4441, footnotes omitted.]

The decision below thus rests in significant part on the majority's answer to a question which this Court has carefully reserved. And however that issue

ultimately be decided, it certainly is anachronistic to attribute that interpretation of the FPASA to Presidents Eisenhower and Kennedy and to the Congresses which sat during the first 15 years after the enactment of the statute.[6/]

Finally, it simply defies reason to argue that Congress is on notice that the President has taken action which "implicitly" relies on a particular statute as authority, and ratifies that implicit interpretation by failing to overturn that action. Nor do the Executive Order and GSA regulation cited at C.A. Op. 12 which did invoke the 1949 Act measurably strengthen the majority's reasoning. Not only were these Executive actions relatively unimportant, but there is no indication that they were brought to the attention of the Congressional committees which would be responsible for amendments to the FPASA. (See SEC v. Sloan, 436 U.S. 103, 120-122 cited at C.A. Op. 24, n. 61.) In contrast, Congress has debated E.O. 11246. But that debate centered on the anti-discrimination policy embodied therein and on whether the 1964 Civil Rights Act should be amended to bar so much of the program as arguably goes beyond the norm stated in that Act. So far as we are aware, during those debates no one suggested that amending the Civil Rights Act would accomplish nothing since §204 of the FPASA granted the President an independent authority to make social policy.

(3) The COWPSA. The Court of Appeals' conclusion that the FPASA's grant of authority is broad does not warrant that court's determination to proceed on the premise that the President can pursue "economy and efficiency" as he understands those terms without regard to other Congressional policies. As the Fifth Circuit has correctly understood, the first limit on the extent of

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6/ It bears recalling that President Truman cited two different statutes as support for his 1951 anti-discrimination orders.

any Executive power which may be implied from FPASA is that such authority ends at the point where there is a "conflict with an express statutory provision [, or with a] fixed intent of Congress and the policy behind that intent [whether or not stated] in specific [statutory] words." (United States v. East Tex. Motor Fr. System, 564 F.2d 179, 185.)

That standard requires the conclusion that E.O. 12092 is invalid. For the use of the procurement sanction to "require compliance" with the pay standard is contrary: to the uniform Congressional policy of regulating prices and wages only through express delegations of authority to the President limited in duration and scope and circumscribed by standards and procedures; to the Congressional determination in 1974 not to extend the last such delegation, to grant only the powers stated in §3(a) of the COWPS Act and to circumscribe that grant through the prohibition of §3(b); and to the free collective bargaining principles of the NLRA.

The majority below dealt at any length only with §3(b) of COWPSA. A reading of pp. 19-24 of its opinion would lead to the conclusion that in this instance Congress acted without the benefit of Committee Reports, debate, or floor action, and that the courts are therefore required in determining the meaning of the refusal to authorize "any mandatory economic controls" to rely on Black's Law Dictionary, state court decisions far removed from the subject at hand, Tenth Amendment decisions at least as far removed, and conjectures as to "likely references" to earlier controls statutes.[7/]

7/ Even the general law, on which the majority exclusively relied, recognizes that compliance with a direction enforceable by disqualification from public contracts may not be "voluntary":

> * * * A waiver secured under threat of substantial economic sanction cannot be termed voluntary. * * * [Lefkowitz v. Turley, 414 U.S. 70, 82-83.]

But there is no vacuum which needs to be filled from these distant sources. The ample legislative materials demonstrate that COWPSA embodies an affirmative Congressional policy that inflation is to be combatted by the operation of the free market rather than by government wage-price regulation of any kind.

First, the point of §3(b) and of the COWPS Act as a whole was stated by Senator Tower, the ranking minority member of the Committee on Banking, Housing and Urban Affairs (which had reported out the bill) and President Ford's floor manager for the legislation. We stress here those portions of Senator Tower's statement which demonstrate the sponsors' concern that the free market must be allowed to operate if inflation is to be overcome:

> I approach this legislation with some amount of apprehension for many may perceive the action which we take today to be the first step back toward controls. If this view is pervasive, it could further exacerbate our inflationary problem by stimulating anticipatory wage and price increases and hence further the prospect of imposition of future controls. Congress must demonstrate that this is not our intent. No economic authority is being granted or authorized. * * *
>
> It has been all too clearly demonstrated by our experience with economic controls that they are by nature arbitrary and artificial, creating shortages and dislocation of resources, certainly imposing more problems on our economy than it resolves. This body may be assured that I will not support any legislation of that kind.
>
> * * *
>
> The provisions embodied in the Council on Wage and Price Stability Act of 1974 represent a license by the Congress to the President to exercise his influence to arrest the inflationary spiral. To this end I believe we should draw the line on acceptable amendments to this legislation where the discipline of an agency or a council of the Federal Government begins to replace the discipline of the marketplace. The discipline of the marketplace should be the final arbitrator of wages and prices.
>
> * * *

> It has also been suggested that the President be given the authority to demand information from all sectors of the economy through the issuance of subpoenas. The President of the United States has not asked for this authority, nor does he want it. The power to subpoena further infringes on the free market system and hence should be rejected. [120 Cong. Rec. 28883; emphasis supplied.]

Second, the issue of free market operation versus government regulation as the method for fighting inflation was sharply drawn in the debate on proposed amendments whereby wage or price increases deemed excessive could be postponed for limited periods. These were rejected because, as Senators Sparkman and Tower observed, they represented a form of wage and price controls; Senator Tower

> reiterate[d] that the essence of this authority would place the President under intense pressure to use it and create the false impression in the mind of the public that such action will reduce inflationary pressure when, indeed, it may not. [Id.]

The same clash of economic philosophies was evident in the debate earlier in 1974, on a proposal of Senators Muskie, Johnston and Stevenson to extend the authority to control wages and prices granted in the Economic Stabilization Act, albeit in a more limited form. That debate also shows that the delegation of authority to the President to control wages and prices was thought to be an abdication of congressional responsibility. (See 120 Cong. Rec. 12618-12619, 12633-12638.)

It follows, we submit, that the ban on "mandatory economic controls" in §3(b) of COWPSA extends to any interference whatsoever with the operation of the free market. The proponents of COWPSA, who regarded even the enforcement of subpoenas to be inconsistent with the free market (see Senator Tower's statement), and who rejected amendments which would have authorized the imposition of even short-term delays, would surely have repudiated in the most explicit terms any suggestion that the Executive could

impose wage and price standards on government contractors, a vast and significant segment of the economy.

Third, Congress enacted COWPSA after refusing to extend the Economic Stabilization Act and did so on the understanding that there was no existing authority for the President to impose maximum wages or prices on anyone. Sen. Tower said that the new law would only "represent a license by the Congress to the President to exercise his influence to arrest the inflationary spiral." That President Ford who proposed the bill and the Congress which enacted it considered that a legislative license must be granted even for the President to use his "influence" over wages and prices in the manner permitted in §3(a) leaves no room for the suggestion that either the Executive or the Legislative branch believed that the President enjoyed a "procurement power" under some other law to establish wage and price standards, and to enforce those standards by the sanction of debarment from government contracts.[8/] Thus, whatever the phrase "nothing in this Act" or similar language may mean in other legislative contexts, as used in §3(b) of COWPSA, it means not merely a withholding of supplemental authority, but an affirmative prohibition against "imposigion * * * of any mandatory economic controls with respect to prices, * * * wages, * * *." For Congress was clearly of the view that nothing outside of COWPSA, that is, nothing in existing law, granted such authority. (Compare Brown v. GSA, 425 U.S. 820, 828.)

(4) The 1979 COWPSA Extension. While the Court of Appeals' majority does not do business with the 1974 legislative history, it seizes on

> The legislative history of this 1979 extension of COWPSA, which was approved while this suit was pending in the District Court, [and which] contains several assertions that Congress did not intend to make any statement on the issues raised in this

8/ The majority's view that §3(b) barred only sanctions such as those in the Economic Stabilization Act (C. A. Op. 21-22) is not only refuted by the sponsors' statement of what they were trying to accomplish, but is inherently unsound. For, §3(a) could not conceivably have been construed to empower the President to obtain injunctions or to institute criminal prosecutions.

> case. Yet it strains credulity to maintain that COWPSA bars the procurement compliance program when Congress has just extended that statute knowing that the Council it established is charged with implementing the wage and price guidelines on which the procurement program is based. [C.A. Op. 23-24; footnotes omitted.]

But §3(b) was not amended in 1979 and this Court has reaffirmed that "It is the intent of the Congress that enacted [the Section] . . . that controls. Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977)." (Oscar Mayer & Co. v. Evans, ____ U.S. ____, 47 L.W. 4568, 4572.) And whatever the limits of that doctrine may be, there can be no doubt that it applies with full force when one House of Congress makes plain that its action in reauthorizing a statute is not intended to change the enacting Congressional intent. That is precisely what the House of Representatives did here. (See H.R. Rep. No. 96-33, 96th Cong., 1st Sess., 3; 125 Cong. Rec. H-2322 (Daily Ed.) (remarks of Reps. Kemp and Moorhead).) More fundamentally the legislative initiative, of course, rests with the Congress, and the legislature cannot be forced to act either by Executive action. It hardly "strains credulity" that Congress should choose to continue a monitoring program that it deems sound and which is therefore non-controversial, while budgeting its time by reserving other related matters. What does strain credulity is that any court should infer ratification in the teeth of an express Congressional denial of any intent to ratify.

* * *

The majority's peroration characterizes the Executive Order challenged herein as part of a "cooperative effort by the legislative and executive branches of our government" (C.A. Op. 25). The very issue in this case is whether that is so. There is no iron law requiring Congress to ignore the immense practical differences between authorizing the President only to "issue wage and price standards and to encourage voluntary compliance

as an act of good citizenship" (id.) and granting the Executive discretionary power to bring into play the Government's enormous economic leverage as a purchaser of goods and services. Indeed, as we have shown there is every indication that Congress has acted on the understanding that there is such a difference and that there are sound reasons of policy to draw a line denying the Executive more than the power to exhort. For the Court of Appeals to obliterate that line by treating any other conclusion as "ironic" and to hold, in the absence of any evidence that Congress deliberately chose to do so, that the legislature has delegated to the President a "procurement power" to declare and effectuate broad economic policies is to abrogate, in the guise of statutory interpretation, this Court's constitutional holding, during a shooting war: "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." (Youngstown Co. v. Sawyer, 343 U.S. 579, 589.)

CONCLUSION

For the above stated reasons this petition for a writ of certiorari should be granted and the case set for argument at the Court's earliest convenience.

Respectfully submitted,

J. ALBERT WOLL
WOLL AND MAYER
815 15th Street, N.W.
Washington, D.C. 20005

SALVATORE J. FALLETTA
1655 West Market Street
Akron, Ohio 44313

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 19th Street, N.W.
Washington, D.C. 20036

WINN NEWMAN
WOODY PETERSON
1126 16th Street, N.W.
Washington, D.C. 20036

THOMAS X. DUNN
SHERMAN, DUNN, COHEN & LEIFER
1125 15th Street, N. W.
Washington, D. C. 20006

PLATO E. PAPPS
ANTHONY T. PODESTA
Machinists Building
1300 Connecticut Avenue, N. W.
Washington, D. C. 20036

SEYMOUR WALDMAN
WALDMAN & WALDMAN
501 Fifth Avenue
New York, N. Y. 10017

JOHN TADLOCK
Post Office Box 2812
Denver, Colorado 80201

CHARLES ARMSTRONG
87 South High Street
Akron, Ohio 44308

BERNARD KLEIMAN
1 East Wacker Drive
Chicago, Illinois 60601

ELLIOT BREDHOFF
BREDHOFF, GOTTESMAN, COHEN & WEINBERG
1000 Connecticut Avenue, N. W.
Washington, D. C. 20036

ISAAC N. GRONER
COLE & GRONER, P. C.
1730 K Street, N. W., Suite 1000
Washington, D. C. 20036

LAURENCE GOLD
815 16th Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioners

Of Counsel:

GEORGE KAUFMANN
2101 L Street, N. W.
Washington, D. C. 20037